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751AASALM Motion
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE: SALTIRE INDUSTRIAL
INC.,

06 CV 4451 (AKH)

-----X

New York, N. Y.
May 1, 2007
4:00 p. m.

Before:

HON. ALVIN K. HELLERSTEIN,

District Judge

APPEARANCES

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and

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BY: MICHAEL S. ETKIN

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(Case called)

THE COURT: Thank you and be seated, please.

Mr. Etkin, where do things stand in the bankruptcy?

MR. ETKIN: Well, let me give you at least the state of play generally, your Honor, as well as the state of play with some of the claims that are alluded to in the papers before you and issues that are before you.

With respect to the bankruptcy proceeding itself most of the claims have been resolved either by stipulation or otherwise. There are several I would call larger claims that remain unresolved and that are the subject of claim objections in the bankruptcy proceeding.

THE COURT: This is generally speaking, not just confined to the case here.

MR. ETKIN: Generally speaking, your Honor, but confining that to the case here --

THE COURT: I want to know both.

MR. ETKIN: I think there is a relationship because there are only a handful of claims that remain unresolved and of those claims and I think there may be somewhere in the vicinity of four or five of them, two of them are involved in this proceeding.

THE COURT: So about half the claims.

MR. ETKIN: Yes. Holt, the Holt claim, obviously,

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remains unresolved, and the claim of the county of Dickson remains unresolved. And just from the standpoint of what's asserted the asserted amounts of those claims they are significant in dollar amount. How they play out ultimately, your Honor, is a difference.

THE COURT: Well, the Holt is an unliquidated claim.

MR. ETKIN: Unliquidated claim.

THE COURT: County Dickson, is that a derivative --

MR. ETKIN: Your Honor, that's a good question.

THE COURT: Thank you. It's reassuring at four o'clock.

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12 MR. ETKIN: That was more for my benefit than yours,
13 your Honor, because I am still scratching my head a little bit
14 over that claim.

15 THE COURT: So you are taking it back with you, the
16 compliment is no longer on the table.

17 MR. ETKIN: No. No. No. I guess four o' clock I am
18 not thinking as quickly as I should.

19 But the County of Dickson claim, your Honor, is
20 appears to at least be a hybrid. Initially when the first
21 claim objection was filed in the bankruptcy proceeding to the
22 County of Dickson's claim the response, a copy of which we've
23 appended to our papers in connection with this motion for
24 reconsideration made it clear to us at least, that that claim
25 was a derivative claim for indemnification or contribution

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1 based upon the then pending personal injury and property damage
2 litigation.

3 That claim appears to have morphed somewhat over the
4 course of the bankruptcy proceeding to one that also involves
5 reimbursement for the closing of the landfill owned by the
6 county. But as far as we know it's hybrid of both. That claim
7 has not been resolved in the bankruptcy proceeding. The only
8 claim that has been resolved as it relates to the parties
9 before you this afternoon is the City of Dickson's claim which
10 was previously expunged in the bankruptcy proceeding.

11 THE COURT: It seems to me that the claim for
12 reimbursement of closing expenses is a different category of
13 claim, from a claim for indemnification of contribution with
14 respect to the Holt litigation.

15 MR. ETKIN: Facially, your Honor, it would appear to
16 be so. We have a sense that, however, that there is some
17 overlap whether intentional or not which we have to get to the
18 bottom of in the context of the bankruptcy case. There has
19 been some limited discovery that has taken place with respect
20 to that claim objection.

21 THE COURT: Well, I need to know that, folks, because
22 that's going to effect how I consider the case. There is one
23 other question on this aspect of it. Some of the Holt
24 plaintiffs have settled. Is there a claim by the city and
25 county for contribution or indemnification with respect to the

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1 settled claims?

2 MR. ETKIN: Your Honor, as far as I know there has
3 been no settlement with respect to any of the Holt plaintiffs.
4 What has settled were the group of plaintiffs that are referred
5 to as the Atkins plaintiffs which was originally one of the
6 sets of personal injury cases that were the subjects of the
7 157(B)(5) motion.

8 THE COURT: That's settled.

9 MR. ETKIN: By final order of the bankruptcy Court.

10 THE COURT: Is there a claim for contribution
11 emanating from that?

12 MR. ETKIN: There is not, your Honor, because as I
13 understand it both the city and the county have also settled
14 with the Atkins plaintiffs and as far as I know there was no
15 actual cash that changed hands, but just an assignment of a
16 portion of the city and county's claim to the Atkins

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17 plaintiffs as part of the consideration for the settlement.
18 And in any event, your Honor, the county's claim still
19 remains pending whether they are going to attempt to seek some
20 reimbursement in connection with the costs of that litigation.
21 I can't tell you standing here right now, but the city's claim
22 has claim has been expunged. So that's no longer an issue for
23 the bankruptcy estate.

24 THE COURT: How much is the amount sought by way of
25 reimbursement for closing the landfill?

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1 MR. ETKIN: Well, the amount that he sought in the
2 county claim, your Honor, is approximately \$4 million.

3 THE COURT: That's everything?

4 MR. ETKIN: As far as I know that's all there.

5 THE COURT: Is there a component for reimbursement of
6 closing expenses?

7 MR. ETKIN: There are a whole host of expenses, your
8 Honor, relating to the landfill and the allegations that the
9 county has made in connection with what the debtor or the
10 debtor's predecessor had done in connection with the landfill.
11 I can't tell you. We've sought some discovery. We've gotten
12 some responses. This isn't the form to comment on how helpful
13 or unhelpful those responses were. That's a matter for Judge
14 Li fland in the bankruptcy proceeding. But just standing here,
15 your Honor, we just don't know what all of the components of
16 those costs involve.

17 THE COURT: With regard to the two or three claims
18 other than the Holt plaintiff's claims, what is the nature of
19 those?

20 MR. ETKIN: One of the claims, your Honor, is a claim
21 by the Ohio Bureau of Workman's Compensation for unpaid
22 reimbursement of workman's compensation claims as well as
23 unpaid assessments. And we just had a hearing before Judge
24 Li fland on several issues relating to that claim.

25 The other claim is an unrelated landfill that the

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1 debtor at one point in time operated in that that claim is
2 being negotiated and will hopefully be resolved. From a
3 dollars and cents standpoint that that claim in at least
4 asserted amount pales in comparison.

5 The other claim is a claim on the part of Newton as
6 well as several former senior executives of the debtor in
7 connection with payment of certain retirement benefits, that
8 Newton had assumed the obligations for those benefits and we
9 attempting to deal with both of those sets of claims. They are
10 related claims, not Newton claims. By virtue of their
11 contractual arrangement on the sale of the business to them
12 many years ago and the employees themselves made claims based
13 upon their retirement benefits and the contractual arrangements
14 that they had with the debtor many years ago.

15 THE COURT: My original order in response to your
16 motion was to accept the transfer order if transferred to me
17 for purpose of onward transfer to Judge Li fland and that was
18 considered by you inappropriate. When I hear about the claim
19 for reimbursement of the expenses for closing the landfill that
20 seems to be a core type of bankruptcy dispute that should stay
21 in the bankruptcy court.

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22 MR. ETKIN: Your Honor, the county's claims against
23 the estate will stay in the bankruptcy court. They are
24 captives of the bankruptcy proceeding whether they like it or
25 not. That claim is going to be there and going to be resolved

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1 there.

2 THE COURT: What about the city's claim?

3 MR. ETKIN: The city's claim has been expunged, so
4 that the city is no longer an issue as far as my client is
5 concerned.

6 THE COURT: What about --

7 MR. ETKIN: The Holts on the other hand.

8 THE COURT: I know about the Holts. We are going to
9 leave that for the moment.

10 But as far as the claim of the county for
11 indemnification or contribution goes, has that been expunged?

12 MR. ETKIN: That has not been expunged.

13 THE COURT: So what has been expunged?

14 MR. ETKIN: No claim that the county has asserted in
15 the bankruptcy proceeding has been expunged. The claim is the
16 subject of a claim objection that is being litigated before
17 Judge Liffland in the bankruptcy proceeding.

18 THE COURT: Now, given that, is there any room for me
19 to entertain any claim by the county?

20 MR. ETKIN: Not as against the debtor, your Honor.

21 THE COURT: That's all I am concerned about. What
22 about the city?

23 MR. ETKIN: Well, not as against the debtor most
24 certainly, only because their claim against the debtor has been
25 expunged.

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1 THE COURT: All right. Now, there is a complication
2 with regard to all the claims by the Holt, against the
3 liquidating trust, against the city and against the county.

4 MR. ETKIN: Correct, your Honor, which led us to the
5 filing of the 157 (B) (5) motion in the first --

6 THE COURT: I understand, but looking now to the claim
7 by the county and the city derivative of the claims against
8 this county and the city, what is your position?

9 MR. ETKIN: With respect to the Holt litigation, your
10 Honor?

11 THE COURT: Yes.

12 MR. ETKIN: Your Honor, I believe and it's set forth
13 in our papers that all of those matters should be litigated
14 here before you.

15 THE COURT: Because of the jury trial.

16 MR. ETKIN: Well, because of the jury trial aspect as
17 it relates to the Holts. But the idea of getting everything
18 potentially under one roof or in one forum is from our
19 perspective very significant from a cost standpoint and from
20 the speed with which we can ultimately resolve these related
21 claims. These claims are all related to one another.

22 THE COURT: Now, this same thing applies in the state
23 court of Tennessee or the federal court in the Middle District
24 of Tennessee. It doesn't make any difference which judge will
25 hear the case.

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1 MR. ETKIN: Well --
2 THE COURT: As long as they're all together.
3 MR. ETKIN: Number one, your Honor, they are never
4 going to be all together because the -- number one, the
5 county's claims against the debtor is going to be resolved in
6 the bankruptcy proceeding.
7 The Holts claims against the debtor, they filed a
8 proof of claim in the bankruptcy proceeding and that claim has
9 been objected to. That's the subject matter of the Tennessee
10 litigation. And that claim, at least the personal injury
11 aspects of that claim, for purposes of liquidation cannot be
12 resolved by the bankruptcy court. There are aspects of the
13 claim which can be resolved by the bankruptcy court. But
14 ultimately if there is no summary basis to expunge the claim in
15 the bankruptcy proceeding, if there needs to be a trial on the
16 merits that will take place in this courthouse.
17 THE COURT: Or in Tennessee.
18 MR. ETKIN: Well, I don't believe it'll take place in
19 Tennessee unless some effort is made by the Holts to
20 affirmatively try to get the case or that aspect of the case to
21 Tennessee because, ultimately, since the bankruptcy court by
22 statute cannot without the consent of the Holts conduct a jury
23 trial and try the personal injury case it would have to be done
24 in an Article III court in this court.
25 THE COURT: Or in a state court.
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1 MR. ETKIN: Not if we can help you it, your Honor.
2 THE COURT: Well --
3 MR. ETKIN: Because we would resist that.
4 THE COURT: Why?
5 MR. ETKIN: Because we don't want to go down to
6 Tennessee and expend the resources to go down to Tennessee and
7 litigate that case in Tennessee.
8 THE COURT: Why should they come up here?
9 MR. ETKIN: Because they're mandated to come up here
10 because they'll subjected themselves to the jurisdiction of
11 bankruptcy court by virtually filing the proof of claim. Now,
12 that doesn't deny them the jury trial right and it doesn't
13 essentially do away with 157 (B) which requires --
14 THE COURT: If they did not file a claim. They would
15 have waived the claim.
16 MR. ETKIN: If they would waive the claim I would pack
17 up my bags and I would go home.
18 THE COURT: If they didn't file a claim --
19 MR. ETKIN: I wouldn't be here in the first place.
20 Kind of like the Lavinia Holt situation by analogy, your Honor.
21 The Lavinia Holts plaintiffs didn't file a proof of claim, only
22 brought their lawsuit post petition in violation of the
23 automatic stay. So our view of that case and the estates
24 exposure with respect to that case is much different than the
25 Harry Holt case.
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1 THE COURT: Look. Harry Holt couldn't sue anywhere
2 while the stay was in force.

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3 MR. ETKIN: Couldn't sue the debtor.
 4 THE COURT: Right. And the debtor is a primary
 5 defendant. Their claim is that the water was poisoned. It's a
 6 poisoned well case. They claim that the pollution carried on
 7 by the debtor's predecessor caused the water to be poisoned.
 8 They had polluted drinking water and they contracted cancer.
 9 They don't go into the truth or not the truth, but I will
 10 accept it at full face value and so they have an important
 11 claim. They cannot do anything with it because they're stayed
 12 for over two years and they have to file a claim in the
 13 bankruptcy or in order not to waiver.
 14 MR. ETKIN: That is correct, your Honor.
 15 THE COURT: All right. So now the stay is finished
 16 and they can litigate and as between their having to come here
 17 to litigate a claim that will depend on witnesses in Tennessee
 18 and incur the expenses of coming here versus having you go
 19 there, the balances of equities are clear it ain't with you.
 20 MR. ETKIN: Well, I would suggest, your Honor, that
 21 there are other considerations.
 22 THE COURT: Like?
 23 MR. ETKIN: Like from the standpoint of filing the
 24 claim in the bankruptcy proceeding and subjecting them to the
 25 jurisdiction of the bankruptcy court and their need to resolve
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1 that claim. Normally most any claims other than personal
 2 injury claims which as we all know are treated somewhat
 3 differently, but the need to resolve that in the bankruptcy
 4 proceeding or if not to resolve that in this district court,
 5 unless they take action and attempt to move that case from the
 6 district court to Tennessee, as I understand it they're
 7 relegated to litigating here.
 8 Now, they have chosen to litigate here.
 9 THE COURT: I have discretion and I resolve that
 10 discretion by ordering the case to go forward in the Tennessee
 11 state courts.
 12 MR. ETKIN: And that, your Honor, resolves the issue
 13 of the Tennessee litigation but it does not, in our view,
 14 resolve the issue of where they need to be or where they have
 15 to be unless they, themselves, take separate action in
 16 resolving their claims against the estate.
 17 THE COURT: I don't understand that.
 18 MR. ETKIN: Your Honor, we sought through 157(B)(5)
 19 the transfer of the entire litigation here as we believe we're
 20 entitled at the do in 157 --
 21 THE COURT: And everybody fell asleep and yours was
 22 the only application on my desk and you won. Then everybody
 23 woke up.
 24 MR. ETKIN: But that, your Honor, involves the
 25 transfer of the underlying Tennessee litigation. Your decision
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1 in terms of abstaining and sending the case back down to
 2 Tennessee in my view, and I think that that view is shared by
 3 the Holts, does not resolve the question of where the Holt's
 4 claim against the estate is going --
 5 THE COURT: It seems to me there is two steps. Step
 6 No. 1 is adjudicating the merits. Step No. 2 is adduced to
 7 judgment, is bringing that up here and asking to be paid. In

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8 that case I guess there will have to be some kind of gradable
9 payment, gradable with all other creditors unless there is some
10 kind of priority and I don't know of any priority.

11 MR. ETKIN: You are right, your Honor, there is no
12 priority. It would be a general unsecured claim but --

13 THE COURT: Which will now be reduced to a judgment,
14 hypothetically.

15 MR. ETKIN: Hypothetically, your Honor. But in the
16 context of the filing of a proof of claim in the bankruptcy
17 proceeding and the filing of the objection by the estate with
18 respect to that proof of claim starts, commences a contested
19 matter under the bankruptcy code which absent the withdrawal of
20 the reference to the district court, which by statute I would
21 presume would be granted would allow them to move the case to
22 the district court without much fight from us from the
23 standpoint of liquidating the claim for distribution purposes
24 and getting their jury trial. But it would not automatically
25 cause their claim, the claimed proceeding, the claim objection

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1 to move down to Tennessee.

2 THE COURT: Do that again. The reference is removed.
3 The case comes back to me from --

4 MR. ETKIN: The bankruptcy court in Southern District.

5 THE COURT: What are my discretionary powers?

6 MR. ETKIN: At that point there wouldn't be much in
7 the way of discretionary powers unless the Holts decided that
8 they wanted to do something in order to get the case
9 transferred down to Tennessee.

10 THE COURT: They want to have it transferred to
11 Tennessee, preferably the state court, less preferably to me in
12 the federal court in Tennessee. That's clear, right?

13 MR. COLANGELO: Your Honor, we had asked that the case
14 be transferred in full to this court. And let me see if I can
15 try to clarify.

16 THE COURT: You want to try your case here?

17 MR. COLANGELO: That is exactly correct and let me
18 explain why. I think what Mr. Etkin is saying is that a part
19 of this case, a part of the Holt plaintiffs claims all stemming
20 from the same poisoned well that you referenced, a part of that
21 will invariably end up in this court regardless of the outcome
22 of this specific motion.

23 THE COURT: What part?

24 MR. COLANGELO: The part that has to do with the Holt
25 plaintiffs claims against the debtor, and let me explain why.

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1 The Holt plaintiffs have sued four defendants, the debtor. The
2 debtor's parent company, the City of Dickson and the County of
3 Dickson, all stemming from the same poisoned well circumstances
4 and have asserted personal injury and property damage claims.

5 Now, as you pointed out, when Saltire filed for
6 bankruptcy in the Southern District of New York the Holt
7 plaintiffs had to assert their claims against that estate in
8 the bankruptcy court here or else they would lose them.
9 What Mr. Etkin just explain is that the debtor objected to the
10 Holt plaintiffs claims.

11 Now, what that means is the resolution of my clients
12 claims against the debtor will end up in federal court in New

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13 York because the bankruptcy court doesn't have jurisdiction to
14 liquidate for purposes of distribution of personal injury
15 claim. So as he mentioned at some point there will be a
16 withdrawal of the reference in that case because of the jury
17 right and because of the personal injury nature of the claim
18 will end up in federal district court.

19 Now, the reason that we want the entire case to be
20 transferred here is that otherwise my client --

21 THE COURT: The case against city or county --

22 MR. COLANGELO: All four.

23 THE COURT: I want to you leave that aside. I am
24 still focused on your claim against Saltire.

25 MR. COLANGELO: Yes.

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1 THE COURT: The way the case came to me originally was
2 not a motion to withdraw the reference.

3 MR. COLANGELO: That's correct.

4 THE COURT: What came to me was a motion to transfer
5 the case from the state court of Tennessee to me and I granted
6 that motion for honorable transfer to the bankruptcy court.
7 Everyone has pointed out it's inappropriate for me to transfer
8 to the bankruptcy court. And in response to the various papers
9 that were sent, I sent it back to the state court in Tennessee
10 from whence it came to me. I have had no motion to withdraw
11 the reference not to this day.

12 MR. COLANGELO: That is correct, your Honor.

13 THE COURT: What I am saying and what I believe
14 Mr. Etkin is saying is that my client's claims against the
15 debtor will as you pointed out need to be reduced to judgment
16 at some point in order for the administration of that estate to
17 be resolved. Why can't they be resolved by the jury trial in
18 state court in Tennessee?

19 MR. COLANGELO: Because as Mr. Etkin's points out his
20 client is not in a position to consent to lifting of the stay
21 to allow the case to proceed in Tennessee because bankruptcy
22 law give him the options -- I should let him speak for himself
23 but your Honor my understanding --

24 THE COURT: I thought the stay was lifted.

25 MR. COLANGELO: No.

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1 MR. ETKIN: If I may, your Honor. It's not really a
2 stay issue because we have a confirmed plan of liquidation.

3 THE COURT: That lifts the stay.

4 MR. ETKIN: It does lift the stay but it enjoins any
5 claim and from proceeding outside of the claim resolution
6 procedure that is anticipated by the bankruptcy code and that's
7 anticipated under our confirmed plan of liquidation.

8 THE COURT: Did the papers have such an injunction?

9 MR. ETKIN: The papers -- essentially, it's a creature
10 of statute, your Honor, and a creature of the bankruptcy code.

11 THE COURT: What is the section?

12 MR. ETKIN: I can't quote it to you as I stand here
13 now.

14 THE COURT: Why do you keep on doing this to me? Why
15 now on the third round am I being given an imperfect record? I
16 am not a bankruptcy maven like you, Mr. Etkin. I know
17 bankruptcy from what I've absorbed over the years as a trial

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18 lawyer at Struck & Struck and from time to time I appeared in
 19 the bankruptcy court and in federal in different places with
 20 regard to bankruptcy issues but I am not a student of
 21 bankruptcy and you are giving me this in little pieces and I
 22 don't have it a comprehensive knowledge of the whole case and
 23 this is the third try. You are not being fair to me. I am
 24 looking at but I mean this is true of everybody. Everybody was
 25 asleep when you brought the motion the first time. I didn't

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1 get papers the last time. Did I get papers on a motion for
 2 reconsideration? That's not the way to practice.

3 MR. ETKIN: Your Honor, to the extent --

4 THE COURT: I look at you but this is to everybody.

5 MR. ETKIN: You can look at me, your Honor. To the
 6 extent my office has been responsible for the confusion, we
 7 apologize and it's certainly not our intent.

8 THE COURT: Mr. Etkins, I know your firm for 50 years.
 9 It's a great New Jersey firm. You've done work with Struck &
 10 Struck and I've always enjoyed the relationship. So I am not
 11 here to start criticizing you. You have a reputation that is
 12 it very impressive.

13 MR. ETKIN: Thank you, your Honor.

14 Nevertheless, it certainly bothers me a great deal
 15 that we have not stepped up to the plate and provided the Court
 16 with all of the information and background that the Court needs
 17 in order to assess these issues.

18 MR. ETKIN: It is unusual in the way as provided from
 19 a procedural standpoint and there are some unusual substantive
 20 issues as well, your Honor.

21 THE COURT: I need to tell you this to be candid. I
 22 am not eager to take this case and I am looking at the case as
 23 Holt versus Saltire Liquidated Trust for a number of reasons.
 24 Substantively the case arose in Tennessee involving local
 25 companies in Tennessee and involving the law in Tennessee and

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1 there's a very important -- that I think refer to in my
 2 previous decision is that people should be judged by the local
 3 juries in the communities that gave rise to the alleged wrongs.
 4 So I'm partial to that.

5 Secondly, as the judge responsible for all the 9/11
 6 cases and with a trial calendar that is going to be very hot
 7 with those cases I'm not in a position to do anything with this
 8 case and to move it along the way you would like. So I mean if
 9 it's me responsibility it'll be my responsibility. But I have
 10 discretion about it. Discretion is likely to be -- move to a
 11 different place.

12 MR. ETKIN: I understand those practical issues, your
 13 Honor, believe me. However, in a bankruptcy setting one thing
 14 that is not unusual is for state law claims that arise under
 15 state law that were the subject of prepetition litigation to
 16 ultimately be resolved either in the bankruptcy court if it's
 17 not a personal jury case, or in the district court sitting in
 18 the same venue as the bankruptcy court if it is a personal
 19 injury case and there is a right to jury trial.

20 Of the unusual aspects of this case that is not one of
 21 them. So this would not be something that occurs once in a
 22 blue moon to have that set of facts and the resolution of those

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23 types of issues.

24 THE COURT: Anyway the Holt people want to come here?

25 MR. ETKIN: That is a significant issue, your Honor,

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1 here. I believe that this is where the Holts want this case to
2 be tried. This is where Albert wants this case to be tried.

3 This is where we certainly want this case to be tried if it
4 gets to that point but we're going to try mightily to resolve
5 the case before then.

6 THE COURT: Do I have discretion to move the case to
7 the federal or state court in Tennessee?

8 MR. ETKIN: Your Honor, it's set forth in the Holt's
9 papers -- and again this was not our motion for
10 reconsideration, but we did file motions papers in support of
11 the motion -- but in Holt's motion and I also was party to the
12 Twinlab cause, so I'm very familiar with that case before Judge
13 Rakoff. There may be some discretion but I believe that it's a
14 limited amount of discretion to exercise that discretion
15 towards permissive abstention, if indeed you have a case that
16 satisfies the dictates of 157(B)(5) which is couched as
17 mandatory despite the fact that the cases since have proceeded
18 that that very limited window of discretion for permissive
19 extension, but under the facts here --

20 THE COURT: I take it.

21 Now, Mr. Colangelo.

22 MR. COLANGELO: Yes, your Honor.

23 THE COURT: What is the point of your case?

24 MR. COLANGELO: The case, your Honor, arises in the
25 contamination of the Holt family well by toxic chemicals that

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1 plaintiffs allege from unsafely deposited in the landfill that
2 was owned by the defendants. So the point of the case.

3 THE COURT: The city and county owned the landfill?

4 MR. COLANGELO: That's correct.

5 THE COURT: They allowed Saltire to use the landfill?

6 MR. COLANGELO: That's what we alleged, your Honor.

7 THE COURT: And the property records reflect that?

8 MR. COLANGELO: That is correct, your Honor.

9 THE COURT: So you are bringing the lawsuit against
10 the city and the county as owners of the land which was
11 contaminated by another?

12 MR. COLANGELO: Your Honor, there are in the
13 complaint, as it is presently drafted there are four claims
14 against the city and county. They are failure to warn, failure
15 have a exercise due care, negligence, and violation of state
16 law regulating solid waste disposal act.

17 THE COURT: The fourth is a statutory case.

18 MR. COLANGELO: That's correct.

19 THE COURT: The first three are general tort courses.

20 MR. COLANGELO: That's correct.

21 THE COURT: So you have a negligence claim basically
22 and a property owner's claim. In all those three situations
23 the active tortfeasor is Saltire. And the secondary
24 tortfeasor is the city and county. So the city and county have
25 a very good to, seems to me, claims of indemnity against the

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1 active party. If the city and county were held jointly liable,
 2 they would have an obligation to pay the plaintiff with a claim
 3 over the active tortfeasor.

4 I guess the problem they have is that if Saltire can't
 5 pay the judgment the city and county remain able to pay the
 6 judgment, that's why you want to sue them basically; is that
 7 right?

8 MR. COLANGELO: The plaintiff's believe that all the
 9 defendants are responsible. That's why we are suing all of the
 10 defendants.

11 THE COURT: So you walk into a situation and you do
 12 that by a very powerful claim by the locality that if they are
 13 going to be sued they're entitled to the protection of the
 14 state law and a lawsuit in the state courts of Tennessee and
 15 that's why I abstained it in their favor. That's a very tough
 16 hurdle to overcome. If you are really interested to stay here
 17 you might want to give up your claims against the city and
 18 county.

19 MR. COLANGELO: Well, your Honor, I have a couple of
 20 responses. Initially, I would say that I believe our clients
 21 are interested in pursuing their claims against all defendants.

22 THE COURT: I would suppose so, but then you come up
 23 against a judge who is concerned about taking a case against a
 24 Tennessee locality.

25 MR. COLANGELO: Your Honor, we recognize both the
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1 practical concerns that you just mentioned in your discussion
 2 with Mr. Etkin as well as your concern regarding the state
 3 sovereign immunity matter. And our response to that is
 4 although we believe jurisdiction is proper and most efficient
 5 in the Southern District of New York, we have argued that the
 6 statute allows for the case to be tried in full in the Middle
 7 District of Tennessee and that we argue that that is the ideal
 8 alternative, not the alternative of exercising permissive
 9 abstention or declining --

10 THE COURT: I am going to restate what you told me,
 11 Mr. Colangelo. If you can't have me take the case you are
 12 content to have it go to a federal judge in Tennessee.

13 MR. COLANGELO: That's correct, your Honor.

14 THE COURT: Are you worried, frankly, against jury
 15 bias, racial prejudice: By the jury in Tennessee.

16 MR. COLANGELO: That's certainly a concern generally
 17 speaking, your Honor.

18 THE COURT: There is a part of your case, is there
 19 not, that claims that your clients were discriminated against
 20 that white people were moved out of the area and black people
 21 were not.

22 MR. COLANGELO: There is a separate lawsuit pending in
 23 the circuit court in Dickson County.

24 THE COURT: That's why you are in the case.

25 MR. COLANGELO: That's correct, your Honor.

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1 THE COURT: Let's make it clear.

2 MR. COLANGELO: And let me --

3 THE COURT: And that case is severed and where it is
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4 it?
5 MR. COLANGELO: No action in several years.
6 THE COURT: Where is it?
7 MR. COLANGELO: The Circuit Court for Dickson County
8 of Tennessee.
9 THE COURT: Why shouldn't one court receive
10 everything?
11 MR. COLANGELO: Your Honor, let me --
12 THE COURT: I know there is an issue if something a
13 jury or nonjury but that's not a problem for a jury.
14 MR. COLANGELO: Your Honor, if we had to represent
15 these plaintiffs when the two cases were settled we would have
16 taken different action. My office became involved in the case
17 in January of this year which was several year after the Title
18 VI intentional racial discrimination claims were severed from
19 the tort personal injury and property damage claims. So I
20 don't disagree with you that in the abstract it makes a lot of
21 sense. It was a development that occurred before we became
22 involved in the lawsuits.
23 THE COURT: Is there any way to put them all together?
24 MR. COLANGELO: That's certainly something we're
25 exploring, your Honor.

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1 The one point that I would emphasize --
2 THE COURT: Mr. Etkin, if it goes to the Middle
3 District of Tennessee what is the problem?
4 MR. ETKIN: The problem from the trust standpoint,
5 your Honor, is one of cost and we're still going to be
6 litigating the claim.
7 THE COURT: What is the big city in the Middle
8 District?
9 MR. ETKIN: I didn't understand --
10 THE COURT: What is the big city?
11 MR. COLANGELO: Nashville, your Honor.
12 THE COURT: Lovely place.
13 MR. ETKIN: It is lovely.
14 THE COURT: Especially in the spring time.
15 MR. ETKIN: The assets of this trust are a bank
16 account and the more we have to spend to resolve litigation
17 that still remains to be resolved. Bear in mind, your Honor,
18 that we haven't distributed any money to unsecured creditors in
19 the case.
20 THE COURT: If it were my court the depositions for
21 each case would all take place where the witnesses reside. So
22 it doesn't make a difference whether you are traveling from
23 here to Tennessee to take discovery. That is same issue. The
24 only difference is the court appearance and the trial. So
25 we're not talking about the major cost here.

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1 MR. ETKIN: Well, the other difference here with the
2 intervening bankruptcy proceeding, your Honor, is as we
3 discussed earlier, we're still going to be litigating the claim
4 objection here in the Southern District of New York, absent
5 some further action or attempts by the Holts to move that.
6 THE COURT: The claim objections for what?
7 MR. ETKIN: The estates' objection to the proof of
8 claim filed by the Holts in the bankruptcy proceeding.

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9 THE COURT: How do you litigate the objection if there
10 is an underlying jury trial?

11 MR. ETKIN: Because the jury trial will take place in
12 this court, your Honor.

13 THE COURT: Or in the Middle District Tennessee?

14 MR. ETKIN: Or if the Holts choose and if the judge
15 assigned on the motion to withdraw the reference decides it
16 might be the Middle District of Tennessee.

17 THE COURT: I'll be the judge.

18 MR. ETKIN: But I don't know that the judge or you
19 absent some affirmative action on the part of the Holts would
20 move the case once the references was withdrawn if there is no
21 motion to change venue.

22 THE COURT: Seems to me I have to hold this case until
23 a motion is made to withdraw that. That seems to me that is
24 what the plaintiffs have to do.

25 MR. COLANGELO: Your Honor, if I may, my sense is that
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1 a grant of the motion to transfer would effectively accomplish
2 the same outcome although we can certainly move to withdraw the
3 reference.

4 Let me clarify that what we're certain concerned about
5 and what we think the law protects against is having to proceed
6 in multiple venues on identical underlying facts all stemming
7 from the same poisoned well circumstances. We as the Holt
8 plaintiffs do not have the ability because of bankruptcy law to
9 do anything with our claim against the debtor's assets other
10 than litigate that claim in the district court for the Southern
11 District of New York or the federal district court in the
12 Middle District of Tennessee and that's mandatory by 157(B)(5).

13 THE COURT: You are saying then I have no discretion
14 to transfer this case with the remanded case to the state
15 courts in Tennessee unless I sever the case against the city
16 and county, which I don't think I want to do.

17 MR. COLANGELO: That is correct. There is a point of
18 permissive abstention.

19 THE COURT: You are arguing very persuasive in the
20 bankruptcy it would be inappropriate for me to do that. That's
21 Mr. Etkin's argument. He is persuasive in that.

22 I haven't heard the city and county and it seems to me
23 that we're forthcoming. First of all, there is an arm twist on
24 my part to try to persuade Mr. Colangelo to drop the case
25 against the city and county, but if he doesn't accept that arm

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1 twist, the next best point that which will be a resting point
2 will be a withdrawal of the reference and a transfer to the
3 Middle District of Tennessee. So what will be the position of
4 the city and the county with regard to that?

5 MS. RICKS: The position of the city, I am
6 representing the city but I'll speak for both at this point.
7 The position first is that this Court doesn't have subject
8 matter jurisdiction over the claims against the city and
9 county. There is no "related to" jurisdiction under Section
10 157. The claim that or the action that the --

11 MR. ETKIN: It is not right, your Honor.

12 MS. RICKS: Your Honor, the action that the Holts have
13 filed against the city and the county has no effect,

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14 whatsoever, on the bankruptcy estate. In Mr. Etkins papers he
 15 has said that they're inexplicably linked, but he has not
 16 articulated that. He has a burden to show how that claim
 17 affects the bankruptcy court.

18 THE COURT: Your argument would be that a claim
 19 against the city and county for its own negligence permitting a
 20 polluter to use a landfill would be a severable claim. It may
 21 be, but the facts would make it very foolish for a judge if he
 22 has any discretion to sever them because the facts of pollution
 23 are going to be the same. What we have is different is whether
 24 the city and county were independently negligent. And there
 25 would be issues that would relate to that but they would be

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1 very close to the issues of pollution generally. It would not
 2 be a smart idea for a judge to treat this separately.

3 MS. RICKS: The Court still has to have jurisdiction
 4 over the claim against the city and the county before it could
 5 can be litigated in this court. If the Holt's's claim against
 6 the city and county has no effect under the bankruptcy
 7 proceeding this Court doesn't have jurisdiction under Section
 8 1334.

9 THE COURT: What is the jurisdiction, Mr. Etkin?

10 MR. ETKIN: Your Honor, let me read to you what was
 11 Exhibit A or at least a sentence from what was Exhibit A to our
 12 papers filed in connection with the Holt's motion for
 13 reconsideration and that was the document that the County of
 14 Dickson filed in the bankruptcy proceeding in response to the
 15 first claim objection.

16 And in paragraph four of that pleading signed by
 17 counsel for the County of Dickson. It says second sentence,
 18 the county filed the claim in the Chapter 11 case because if it
 19 is ultimately found libel in the litigations referring to --

20 THE COURT: So what you are telling me is the filing
 21 of the claims --

22 MR. ETKIN: The filing of the claim that essentially
 23 the derivative, the so-called derivative claim in the
 24 bankruptcy proceeding.

25 THE COURT: But Ms. Ricks is saying that so much of

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1 the claim as is independent is a claim against the city and
 2 county as defendants and that's there but what you were arguing
 3 and what I would agree with is that they're connected.

4 MR. ETKIN: There is no denying this, your Honor.

5 THE COURT: It would be a very foolish act of judicial
 6 decision making to separate those two claims and I will hold
 7 that. You are here. Now the question is, are you going to
 8 stay with me or are you going to go to the Middle District?

9 MS. RICKS: We certainly would prefer to be in the
 10 Middle District of Tennessee and there are very practical
 11 reasons that these cases need to be tried in Tennessee.

12 THE COURT: I agree with you. They're evident.
 13 Everything was there.

14 MS. RICKS: We have witnesses, employees who were no
 15 longer employees. This Court doesn't have subpoena power.

16 THE COURT: Yes, we do.

17 MS. RICKS: We voluminous documents maintained about
 18 the state of Tennessee.

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19 THE COURT: Documents are not a big deal but your
20 witnesses are a big deal and their all in Tennessee.
21 What else did you want to tell me, sir?
22 MR. POTTER: I do represent Dickson County and just a
23 couple things I heard Mr. Etkin mention I had want to speak to.
24 Number one, the claims that were made by the Holts against the
25 city and the county, I know that Mr. Colangelo said that there
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1 were some general tort common law claims and also a statutory
2 claim were violation of the Tennessee solid waste management
3 act essentially know all of those claims are statutory claims
4 because the tort claims are governed by the --
5 THE COURT: I'm going to anticipate what you are
6 saying because the hour is drawing late. What you are saying
7 is those are judge's decisions that's what you are coming to
8 but the same judge that sits with the jury will have to make
9 his own decisions and filings and conclusions and he can either
10 agree or disagree with the jury verdict.
11 The jury will have the tort claims brought against the
12 liquidating trust. The claims against the county and
13 presumably the city as well will have a large component that
14 will be -- and judge can make the decisions. That's not a
15 problem.
16 MR. POTTER: The point of my argument though is that
17 those claims are essentially claims that are governed by
18 interpretation of Tennessee law and whether this court is more
19 than capable of doing that.
20 THE COURT: No, I don't think I am. But a judge in
21 Tennessee, in Nashville, grew up with Tennessee law, I am sure
22 that judge will know how to charge the jury accordingly as
23 well.
24 MR. POTTER: The other thing I want to point out is
25 you know this case involves a very peculiar and special set of
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1 facts. From a practical standpoint I think that these
2 defendants are entitled to either a jury or a judge who has
3 some knowledge about the circumstances that are going to be
4 discussed. Where is the landfill located? What does it look
5 like? Where are the wells in --
6 THE COURT: How far are you from Nashville?
7 MR. POTTER: About 40 miles, 45 west heading to
8 Memphis.
9 Now, I heard Mr. Colangelo's case, if this Court won't
10 accept this case we would like this case to be argued in the
11 Middle District court or federal district court because we're
12 concerned about racial bias of the jury. That, your Honor, is
13 an offensive argument because the people in Dickson County are
14 capable of sitting on a very impartial jury. There is no taint
15 of racism.
16 THE COURT: I believe I did say that drawing that the
17 allegations of the claim but I don't want to subscribe to
18 something I know nothing about. To the extent that I left the
19 impression that I was making some kind of a judicial finding to
20 that regard, I am not, and I regret the impression.
21 MR. POTTER: The point is that the people of Dickson
22 county are well aware about these circumstances and they're
23 more than capable of putting together a jury that's impartial

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24 and educated.

25 THE COURT: I agree with you, sir, but what I have
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1 been told is that there is an exclusive federal jurisdiction
2 here because of the bankruptcy set up and because there has to
3 be a withdrawal of the reference into that federal court,
4 either my court or the Middle District of Tennessee.

5 MR. ETKIN: Your Honor, if it were up to me and my
6 client --

7 THE COURT: That is not the question. The question is
8 does a case have to stay in the federal --

9 MR. ETKIN: Those are the only options. It would have
10 to stay in the federal system.

11 THE COURT: So based on that the logical case is for
12 the Middle District of Tennessee, but there has to be a motion
13 to withdraw the reference and that needs to be made. Mr. Etkin
14 doesn't want to make it. Not in your interest to make it.

15 MR. ETKIN: Not in my interest, your Honor.

16 THE COURT: So the Holt plaintiffs have to make it be.

17 MR. ETKIN: That would be their motion to make.

18 MR. COLANGELO: Your Honor, just a point of
19 clarification with the bankruptcy law, our understanding is
20 that under 157(B)(5) the statute provides that the district
21 court shall order that personal injury tort and wrongful death
22 claims be tried either in the district court in which the
23 bankruptcy proceeding is taking place or in the district in
24 which the case arose so --

25 THE COURT: It has to be a withdrawal with reference.
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1 I think that's what Mr. Etkin as the bankruptcy lawyer has
2 represented to the Court and it is also my understanding.

3 MR. ETKIN: It would have to been a withdrawal of the
4 reference with respect to the claimed objection proceeding that
5 is pending before Judge Livland in the Southern District
6 bankruptcy court.

7 MR. COLANGELO: We don't disagree with that.

8 THE COURT: So there has to be a withdrawal of the
9 reference.

10 MR. COLANGELO: We're happy to move for withdrawn of
11 the reference, your Honor.

12 THE COURT: Is there any objection to the oral motion
13 at this point in time or does anyone insist on it being in
14 writing?

15 MR. ETKIN: Your Honor, I would prefer that -- it's
16 not a complicated motion to make. I would prefer for it to be
17 in writing so I would have the opportunity to just discuss with
18 the trustee.

19 THE COURT: All right. When are you going to make the
20 motion, Mr. Colangelo?

21 MR. COLANGELO: Your Honor, we can file it this week.

22 THE COURT: All right. File it by -- file it this
23 week and I don't want to make you come up and I don't want to
24 write necessary on this issue, so let me make these findings
25 and conclusions.

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1 The motion for reconsideration. In my original
 2 decision of January 8, 2007 and my first reconsideration of
 3 February 22, 2007 is granted. It is very unusual to grant a
 4 motion for reconsideration. The law is restrictive with regard
 5 to such motions.

6 In addition, criticizing all counsel for not having
 7 presented the record in the case to me in full so I could have
 8 made the right ruling at the outset, and even know the record
 9 is incomplete because it has to wait for a motion to withdraw
 10 the reference, but the issues now are sufficiently clear to
 11 allow me to say the following by way of findings and
 12 conclusions:

13 First, there is a strong bankruptcy or a strong
 14 federal interest on the part of Saltire Liquidating Trust. The
 15 existence of these cases making up the largest part of the
 16 potential claims against the estate must be resolved in order
 17 for the state or the estate to be distributed to -- that's very
 18 strong federal interest and in my judgment it makes abstention
 19 inappropriate.

20 When I granted abstention in my order of February 22,
 21 2007, I didn't appreciate the strength of the interest on the
 22 part of liquidated trust. It's important for the efficient
 23 administration of the bankruptcy estate that there be a federal
 24 adjudication because it has the most approximate sensitivity to
 25 bankruptcy issues. And because of that I cannot say that state

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1 law issues predominate over bankruptcy issues.

2 Although there are difficulties and complexities with
 3 regard to state law and I'm going down the 12 criteria that I
 4 expressed in my earlier decision. And, particularly, because
 5 of the law suits advanced by the city and the county, they do
 6 not overwhelm the bankruptcy issue, and I think the other
 7 factors are less important than the ones I mentioned. So these
 8 are part of the core issues of bankruptcy. There are claims
 9 against the estate that must be resolved and it would be
 10 inappropriate to settle the claims in regard to the city and
 11 county. They are involved as well.

12 The finding of pollution necessarily has to be made
 13 against the predecessor of Saltire, bears very strongly upon
 14 any negligence claims or any statutory claims against the city
 15 or operating length or improper. And I am particularly
 16 sensitive that there are many state and local issues with
 17 regard to the operation. In many respects there is nothing
 18 more local than a landfill serving the citizens and the
 19 business interests in the local community. But again, the
 20 presence and strength of the bankruptcy from remains to
 21 dominate that interest as well.

22 We're down to factor number eight. Factor nine is the
 23 burden on the Court's docket. I've already spoken to the
 24 burden on my docket. But there are more important reasons for
 25 transferring that case mostly the references were drawn to the

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1 Middle District of Tennessee is because the proximity to the
 2 local interests. This landfill was 45 minutes, I am told, from
 3 the business heart of Nashville and therefore there is
 4 proximity on the part of the judge and the jury in Nashville to

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5 what happened in the locality, much more so than a judge and
6 jury in the Southern District of New York.
7 I think those really are all the relevant factors. So
8 for these reasons it is appropriate to reconsider my order by
9 which I abstained and remanded the case back to the state
10 courts of Tennessee. The argument for retaining jurisdiction
11 in respect to the bankruptcy proceedings and the Bankruptcy
12 Court of the Southern District New York were strong, but there
13 now has to be a motion to withdraw the motion which will be
14 made this week and filed.

15 And I will expect a submission by you, Mr. Etkin, a
16 week from Friday which will be May 11, I believe, representing
17 to me what will be the position of the liquidated trust. Not
18 hearing from you the case will be transferred to the Middle
19 District of Tennessee.

20 Is there anything I've missed, Mr. Etkins?

21 MR. ETKIN: No, your Honor.

22 THE COURT: Mr. Colangelo?

23 MR. COLANGELO: No, your Honor.

24 THE COURT: Ms. Ricks?

25 MS. RICKS: No, your Honor.

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1 THE COURT: Mr. Potter?

2 MR. POTTER: No, sir.

3 THE COURT: Thank you all for coming.

4 MR. ETKIN: Again, my apologies, your Honor, for
5 causing some of the confusion that's prolonged and complicated
6 these proceedings.

7 THE COURT: Thank you, sir.
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